Supreme Court, U. S.
FILED
OCT 15 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1979

No. 79-359

JACK M. LOTZE AND BEVERLY J. LOTZE, his wife; RONALD M. FROSTAD AND FRANCES M. FROSTAD, his wife; ROSA F. MEYER, CLIFFORD E. MEYER, MARILYN J. MEYER, DONALD J. MEYER AND EVELYN HOPE MEYER, DARREL HENYAN; AND LARRY A. LOEW AND PATRICIA E. LOEW, his wife,

Appellants,

VS.

THE STATE OF WASHINGTON,

Appellee.

APPELLEE'S MOTION TO DISMISS

SLADE GORTON,
Attorney General
THOMAS R. GARLINGTON,
Senior Assistant Attorney General
Attorneys for Appellee.

Office and Post Office Address:
Temple of Justice
Olympia, Washington 98504
(206) 753-6126

STATE PRINTING PLANT OLYMPIA, WASHINGTON

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THE STATE OF WASHINGTON,

Appellee.

APPELLEE'S MOTION TO DISMISS

Comes now the Appellee, State of Washington, by Slade Gorton, Attorney General, and Thomas R. Garlington, Senior Assistant Attorney General, and hereby moves to dismiss the appeal herein pursuant to Rule 16(1)(b) for the reason that it does not present a substantial federal question.

Appellee further moves to dismiss on the ground that the issue of prior restraint has never been raised in the proceedings nor expressly passed on by the Supreme Court of the State of Washington.

DATED this 3rd day of October, 1979.

SLADE GORTON
Attorney General

THOMAS R. GARLINGTON
Senior Assistant Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 3rd day of October, 1979, I served three copies of the foregoing Appellee's Motion To Dismiss upon the attorney for appellants by causing a copy of said motion to be mailed, first class, postage prepaid, to:

Stephen R. Blake
SKOK & BLAKE
Skok Building
Chewelah, Washington 99109

Further, that all parties required to be served were served.

THOMAS R. GARLINGTON
Senior Assistant Attorney General

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Appellants,

VS.

THE STATE OF WASHINGTON,

Appellee.

APPELLEE'S BRIEF IN SUPPORT OF MOTION TO DISMISS

SLADE GORTON,
Attorney General
THOMAS R. GARLINGTON,
Senior Assistant Attorney General
Attorneys for Appellee.

Office and Post Office Address:
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STATE PRINTING PLANT ◀●▶ OLYMPIA, WASHINGTON

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Appellants,

VS.

THE STATE OF WASHINGTON,

Appellee.

APPELLEE'S BRIEF IN SUPPORT OF MOTION TO DISMISS

Comes now Appellee, State of Washington, by Slade Gorton, Attorney General, and Thomas R. Garlington, Senior Assistant Attorney General, and submits the following brief in support of the Motion to Dismiss.

Appellant contends that the issue on appeal is whether the State statutes (RCW 47.42.030 and RCW 47.42.040) violate First Amendment rights. Jurisdictional Statement at 7.

In two previous decisions, this Court has dismissed the same constitutional challenge to statutes regulating billboards. In *Suffolk Outdoor Advertising Co., Inc. v. Hulse*, 43 N.Y.2d 483, 373 N.E.2d 263 (1977), *appeal dismissed for lack of substantial federal question*, 58 L. Ed. 2d 101, 99 S. Ct. 66 (1978), the New York Court of Appeals reviewed a statute which prohibited all nonaccessory (off site) billboards. Citing *Virginia Pharmacy Bd. v. Virginia Consumer Council*, 425 U.S. 748, 770-771, 96 S. Ct. 817, 48 L. Ed. 2d. 346, the court held that while the the speech was protected under the First and Fourteenth Amendments, the city could regulate the time, place and manner of such speech.

In its opinion at page 371, the New York court noted that there was no prohibition as to the contents of the speech, and there was an "operative" means of advertising through on-premise signs. The availability of an ample alternate channel of communication was obviously a factor.

The appeal to the United States Supreme Court was dismissed for lack of a substantial federal question. Such a dismissal is seen as a decision on the merits. (*Hicks v. Miranda*, 422 U.S. 332, 45 L. Ed. 2d 223, 95 S. Ct. 2281 (1975).)

Previous to *Suffolk v. Hulse, supra*, this Court had dismissed a challenge to billboard legislation on First Amendment grounds.

In *Markham Advertising Co. v. State of Washington*, 73 Wn.2d 405, 439 P.2d 248, *appeal dismissed for want of a substantial question*, 393 U.S. 316, 21 L. Ed. 2d 512, 89 S. Ct. 553 (1969), the State Supreme Court ruled that the control of outdoor advertising at RCW 47.42 did not violate the First Amendment. It should be noted that the statute in *Markham* prohibited signs within 660 feet of the interstate right of way, whereas the statute now before the Court uses visability as the criteria.

The signs in *Markham* occasionally displayed noncommercial messages dealing with political, religious and philanthropic topics.

The Washington statute now before the Court makes no distinction between commercial and noncommercial billboards, nor is it a total prohibition of signs. Some signs are permitted subject to restrictions of size, location, and number.

Appellee submits that if the regulation of commercial billboards used for a variety of messages does not present a substantial federal question, then this appeal does not present such a question.

DATED this 3rd day of October, 1979.

Respectfully submitted,

SLADE GORTON
Attorney General

THOMAS R. GARLINGTON
Senior Assistant Attorney General
Attorneys for Appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 3rd day of October, 1979, I served three copies of the foregoing Appellee's Brief In Support of Motion to Dismiss upon the attorney for appellants by causing the copies of said brief to be mailed, first class, postage prepaid, to:

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THOMAS R. GARLINGTON
Senior Assistant Attorney General